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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN CREED ARROWSMITH, Defendant and Appellant.	C083198 (Super. Ct. Nos. 15F7330, 16F1440, 16F3482)

At about 10:00 p.m. on the Fourth of July, the victim was struck and killed by a motorcycle while standing in the road in front of a house in the Happy Valley area of Shasta County. She was in the roadway talking to defendant Justin Creed Arrowsmith, who stopped his ATV in the road in front of the house in order to talk to her. As they spoke, the motorcycle pulled out of a driveway a short distance away, accelerated, and drove into both the ATV and the victim. Defendant, who was under the influence of

alcohol at the time of the collision, left the scene on foot before emergency responders arrived.

Defendant was convicted by jury of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)) and failure to stop at the scene of an accident resulting in death (Veh. Code,[1] § 20001, subd. (a)). The jury also found defendant left the scene of the crime after committing vehicular manslaughter while intoxicated (§ 20001, subd. (c)) and caused bodily injury to more than one victim (§ 23558). The trial court sentenced defendant to serve an aggregate determinate term of eight years in state prison.[2]

On appeal, defendant contends his vehicular manslaughter while intoxicated conviction must be reversed because: (1) the prosecution did not prove the "unlawful act" forming the basis of that charge, i.e., that he stopped a vehicle upon the roadway *in an unincorporated area* in violation of section 22504, subdivision (a); (2) the killing did not occur while defendant was driving, but rather while he was stopped on the roadway; and (3) defendant was not the proximate cause of the victim's death.

We agree with the first of these contentions and therefore need not address the remaining two. As we explain, conviction of vehicular manslaughter while intoxicated requires, among other elements, that a human being was killed as the proximate result of the defendant's negligent commission of either "an unlawful act, not amounting to a felony" or "a lawful act that might produce death, in an unlawful manner . . . ." (Pen. Code, § 191.5, subd. (b).) The prosecution relied on an unlawful act theory of the crime,

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[1] Undesignated statutory references are to the Vehicle Code.

[2] This eight-year term was imposed for these crimes and enhancements in Shasta County Case No. 16F1440. The trial court imposed concurrent sentences in two other cases, Shasta County Case Nos. 15F7330 and 16F3482, on the same day. Because the issues raised in this appeal involve only Case No. 16F1440, we mention the other cases no further.

alleging violation of section 22504, subdivision (a), as the unlawful act that proximately caused the victim's death, and the jury was so instructed. However, the prosecution did not prove one of the elements of this violation of the law, i.e., that the roadway in question was in an unincorporated area. We must therefore reverse defendant's conviction for vehicular manslaughter while intoxicated, strike the enhancements attached thereto, and remand the matter for resentencing.

FACTS

On the night of July 4, 2013, the victim was visiting a friend at a house on Lassen Avenue in Happy Valley. She and the friend left the house at around 10:00 p.m. and walked out to the driveway, where the victim was supposed to meet defendant. Defendant showed up moments later on an ATV and stopped the vehicle in the middle of the road in front of the house. The victim's friend testified defendant was there to pick the victim up. According to defendant's statement to law enforcement, he was there simply to talk to the victim and return her phone charger. Regardless of defendant's purpose, the victim walked out into the road to talk to him. The friend joined them in the roadway, but was using her cell phone having a text message conversation with her boyfriend. She believed the ATV's headlights and taillights were not turned on. The roadway was dark, there being no street lights on that stretch of road.

A few minutes later, a short distance down the road, Bryan Reed pulled out of his sister's driveway on a motorcycle and began accelerating towards the ATV. The victim's friend said, "let's move," and walked to the side of the road. The victim remained near the ATV. The motorcycle struck the back of the ATV and then the victim was thrown several feet and knocked to the ground, striking her head against the pavement. The victim's friend heard the collision as she walked across the road and turned around to see the motorcycle skidding toward her on its side. Reed, still holding on, managed to stop the motorcycle before it reached her. The victim's friend initially went to Reed's aid,

who injured his hand and wrist in the collision. She then saw the victim lying on the pavement in the road and went over to her friend. The victim was moaning, but unresponsive to conversation, and was bleeding from her head. It is unclear whether defendant was still on the ATV when the collision occurred, but it appears he was uninjured.

Various neighbors, including Reed's sister and niece, came out to the crash site shortly after the collision. Susan and Joseph Ames were driving home when the collision occurred. They were flagged down when they came upon the crash site. Joseph called 911. He also had some medical training, so he provided medical assistance to the victim until emergency responders arrived. Defendant left the scene on foot before they arrived. Reed's sister testified defendant took what she believed to be drugs out of the victim's bra before he departed the scene.

Emergency medical personnel arrived a short time later, followed by several California Highway Patrol officers. One of the officers spoke to Reed, who appeared to be under the influence of a controlled substance.[3] After determining defendant was the driver of the ATV, this officer located defendant at his home and spoke with him about the collision. Defendant appeared to be under the influence of alcohol. This observation was supported by the results of several field sobriety tests, leading to defendant's arrest. Subsequent blood-alcohol testing confirmed defendant was intoxicated. Meanwhile, the victim was transported to the hospital, where she was pronounced dead. She died of injuries sustained in the collision.

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[3] Subsequent investigation of the crash site revealed a pouch on Reed's motorcycle contained psilocybin mushrooms, edible marijuana, a lighter, a spoon with burned residue on it, and two syringes.

DISCUSSION

Defendant contends his vehicular manslaughter while intoxicated conviction must be reversed because the prosecution did not prove the "unlawful act" forming the basis of that charge, i.e., that he stopped a vehicle upon the roadway *in an unincorporated area* in violation of section 22504, subdivision (a). We agree.

" '[The] Fifth Amendment right to due process and Sixth Amendment right to jury trial . . . require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime.' [Citation.] 'In reviewing a sufficiency of evidence challenge, we view the evidence in the light most favorable to the verdict and determine whether *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' [Citation.]" (*People v. Davis* (2013) 57 Cal.4th 353, 357 (*Davis*).)

"Manslaughter is the unlawful killing of a human being without malice." (Pen. Code, § 192.) In order to convict defendant of vehicular manslaughter while intoxicated, the prosecution was required to prove: (1) he drove a vehicle while intoxicated; (2) in so driving, he negligently committed either "an unlawful act, not amounting to a felony" or "a lawful act that might produce death, in an unlawful manner"; and (3) another person was killed as a proximate result. (Pen. Code, § 191.5, subd. (b).)

With respect to the second element of this crime, the prosecution relied on a theory defendant committed an unlawful act, specifically a violation of section 22504, subdivision (a). This subdivision provides in relevant part: "Upon any highway *in unincorporated areas*, a person shall not stop, park, or leave standing any vehicle, whether attended or unattended, upon the roadway when it is practicable to stop, park, or leave the vehicle off such portion of the highway . . . ." (§ 22504, subd. (a), italics added.)

In accordance with this theory, the jury was instructed as part of the vehicular manslaughter while intoxicated instruction (CALCRIM No. 591) that it was required to determine whether or not defendant "committed an infraction." The jury was not instructed the second element set forth above might also be satisfied by defendant's negligent commission of an "otherwise lawful act that might cause death," included as a bracketed option in CALCRIM No. 591. The jury was then instructed the infraction the prosecution alleged defendant committed was a violation of section 22504, subdivision (a), and set forth the elements of that offense, including: "No. 1, the defendant drove a vehicle upon any highway *in an unincorporated area* . . . ." (Italics added.)

However, while the prosecution adduced testimony during the preliminary hearing that the road on which the collision occurred was in an unincorporated area, no such evidence was produced at trial. The Attorney General concedes this to be the case, but argues the jury could have reasonably inferred the area was unincorporated from testimony that Lassen Avenue was "a two-lane country road without streetlights" and from an "overhead map of the area [showing] it was rural in character with only a few dwellings scattered throughout the area." We are not persuaded. As the Attorney General also notes, Government Code section 56043 provides: " 'Incorporation' means the creation or establishment of a city. Any proposal for incorporation as a city shall have at least 500 registered voters residing within the affected territory at the time the proposal is initiated." The second sentence of this provision makes clear incorporated areas are not necessarily also urban areas. There are many rural country roads without streetlights within incorporated areas of this state.

The Attorney General also relies on testimony that the collision occurred in Happy Valley and asks this court to take judicial notice of the fact that this area of Shasta County is indeed unincorporated. While we may generally take judicial notice "that a

particular location is not within the limits of any incorporated city" (*People v. Armas* (2011) 191 Cal.App.4th 1173, 1187 (*Armas*), citing *People v. Velarde* (1920) 45 Cal.App. 520, 529), as we stated in *People v. Tomasovich* (1922) 56 Cal.App. 520, where the unincorporated status of the location in question *is an element of the crime* charged against the defendant, "it is extremely doubtful whether the courts may take judicial notice of the fact that any particular place or locality is not within the limits of an incorporated city." (*Id*. at p. 533.) We did not decide the question, however, instead concluding that even if the trial court "erred in taking judicial notice of the fact that the place where [the defendant sold liquor] was not within the limits of an incorporated city, and so instructing the jury," the presumed error was harmless because there was uncontradicted evidence presented at trial establishing the defendant sold the liquor outside city limits. (*Ibid*.)

The question in this case is not whether *the trial court* erred in taking judicial notice of the fact that the collision occurred on a highway in an unincorporated area and instructing the jury that element of a section 22504 violation was satisfied. Such an error is subject to a harmless error analysis. (See *People v. Flood* (1998) 18 Cal.4th 470, 506 ["when a trial court commits federal constitutional error in removing an element of an offense from the jury's consideration, the error may be found harmless"].) Here, the trial court was not asked to take judicial notice of Happy Valley's unincorporated status. The question for us is whether *we at the Court of Appeal* may take judicial notice of this fact in order to satisfy an element that was not proved at trial and affirm the judgment on that basis. We may not do so.

In so concluding, we are guided by our Supreme Court's decision in *Davis*, *supra*, 57 Cal.4th 353. There, the defendant was convicted of possession of a controlled substance based on evidence he possessed MDMA, i.e., Ecstasy. However, because neither "MDMA" nor "Ecstasy" are listed in the Health and Safety Code as controlled

substances, the prosecution was required to prove the substance "(1) contains any quantity of a controlled substance such as amphetamine, methamphetamine, or MDA, or (2) meets the definition of an analog." (*Id*. at pp. 358-359.) Despite the fact no such evidence was introduced at trial, the Court of Appeal "took judicial notice of several learned treatises" and concluded the substance contains methamphetamine and amphetamine. (*Id*. at p. 359.) Our Supreme Court reversed, explaining: "While the Court of Appeal, having referred to outside sources, satisfied itself that the pills in question qualified as a controlled substance, those sources were not before the jury. [Citation.] All the jury had before it was a chemical name not listed in any schedule of the code. An appellate court cannot take judicial notice of additional facts the prosecution failed to prove at trial to affirm a conviction. [Citations.] The critical inquiry is whether 'the *record* evidence could reasonably support a finding of guilt beyond a reasonable doubt.' [Citation.]" (*Id*. at p. 360.)

Here, as in *Davis, supra,* 57 Cal.4th 353, evidence proving an element of the crime was not established at trial. We may not take judicial notice of facts necessary to prove this element in order to affirm defendant's conviction.[4] To the extent the Court of Appeal did so in *People v. Velarde*, *supra,* 45 Cal.App. 520, relied upon by the Attorney General, we conclude this decision is no longer good law following *Davis*. We also note that in *Armas*, *supra*, 191 Cal.App.4th 1173, also relied upon by the Attorney General, the Court of Appeal was careful to point out it took judicial notice of the fact that a particular location was not within the limits of any incorporated city "not as a substitute for any failure of proof on the prosecution's part at trial," but rather to support its

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[4] For this reason, we deny the Attorney General's request for judicial notice filed August 11, 2017.

rejection of an argument made by the defendant on appeal. (*Id*. at p. 1187, fn. 13.) *Armas* is therefore inapposite.

Finally, we also consider the Attorney General's reliance on *People v. Peters* (1950) 96 Cal.App.2d 671 to be misplaced. There, the Court of Appeal affirmed an involuntary manslaughter conviction despite the absence of direct evidence the defendant's act of stabbing his friend caused the friend's death, explaining the defendant's sole reliance on a claim of self-defense necessarily conceded "the death resulted from the knife wound." (*Id*. at pp. 675-676.) The Attorney General argues, "[t]he same logic applies here with equal force as the defense effectively conceded the unincorporated area element." We disagree. While the defense did not contest that element at trial, as defendant points out in his reply brief, the " 'prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 69 [116 L.Ed.2d 385].) Indeed, we conclude this case is more analogous to *People v. Byrd* (2016) 1 Cal.App.5th 1219, in which we reversed a conviction for fleeing from a pursuing police officer because "the prosecutor neglected to ask a single, simple question to elicit evidence of the officers' attire and there is no evidence otherwise in the record that the officers were wearing distinctive uniforms," an essential element of that crime. (*Id*. at p. 1225.) Similarly, here, the prosecutor could have asked a single question in order to elicit testimony that the road in question was located in an unincorporated area, as she did during the preliminary hearing.

Because the prosecution did not prove each element of defendant's vehicular manslaughter while intoxicated conviction, we must reverse this conviction and strike the enhancements attached to that count. (See *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1468-1469 [striking enhancement attached to reversed conviction].)

DISPOSITION

Defendant's conviction for violating Penal Code section 191.5, subdivision (b), is reversed and the enhancements attached to that conviction are stricken. The matter is remanded for resentencing. In all other respects, the judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
BLEASE, Acting P. J

/s/
MAURO, J.